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No. 82-633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LEE S. LEICHTLING, D.D.S.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Eighth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

Petitioner contends that the affidavit (Pet. App. A-17 to A-19) in support of the search warrant did not establish the requisite probable cause to sustain a magistrate's finding that contraband would be found in his residence. The affidavit states that on one occasion, the affiant observed appellant to be in possession of contraband and "drive in the direction of the residence" (Pet. App. A-17), and on another occasion "drive to the above-described residence." (Pet. App. A-18). The affidavit is void of any allegation by the affiant that the appellant transported contraband into his residence, or even that appellant exited his vehicle.

Respondent suggests that this defect is cured by the affiant's testimony (Tr. 9) that he observed petitioner take the contraband into his house (Resp. 6). The obvious flaw in respondent's argument is that this testimony was adduced at petitioner's motion to suppress evidence, approximately three months *after* the presentation of the affidavit to the magistrate. In the same motion, the affiant conceded that the affidavit lacked any information concerning the petitioner exiting his vehicle, entering his house, or carrying contraband therein (Tr. 13).

The finding of probable cause to support the issuance of a search warrant must be based upon information contained solely in the sworn affidavit and/or sworn recorded testimony presented to the magistrate. *Zurcher* v. *Stanford Daily News*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1963). Respondent mistakenly argues that it would be "unreasonable" for the magistrate to conclude that the contraband was anywhere else but inside petitioner's residence (Resp. 6-7). Petitioner submits, and the record and affidavit clearly reveal, that the magistrate had no evidence before him that the petitioner carried contraband into his house, nor even that petitioner exited his vehicle (Tr. 13, Pet. App. A-17 to 19).

Respondent's brief requests the Court to invoke the concurrent-sentence doctrine and decline to review petitioner's case (Resp. 4, n.1). Of course, this option lies purely in the discretion of the Court, as there is no jurisdictional bar to consideration of multiple convictions, even though concurrent sentences were imposed. *Benton* v. *Maryland*, 395 U.S. 784, 791 (1969). Although the *Benton* Court had difficulty finding any satisfactory explanation for the concurrent sentence doctrine, *Id.*, at 789, petitioner submits that the doctrine is inapplicable here as the evidence obtained in the illegal search of petitioner's residence tainted petitioner's entire case so as to deprive him of a fair trial.

Petitioner was charged with six counts of obtaining a controlled substance by fraud and one count of possession of a controlled substance with the intent to distribute. A total of thirty-three government exhibits (Tr. V-VI) were admitted into evidence over counsel's objection (Tr. 44, 249). Petitioner argues that due to the sheer number and nature of the government exhibits, e.g., scales, bottles labeled cocaine, cocaine and quaalude prescriptions, the trial error in admitting same affected all seven counts of petitioner's convictions. Thus, all of the evidence was indelibly tainted by the admission of the above exhibits, precluding application of the concurrent-sentence doctrine. *Benton*, at 789, n.2.

Additionally, the adverse collateral effects of petitioner's seven count conviction, recognized in *Sibron* v. *New York*, 392 U.S. 40 (1968), makes petitioner's case justiciable. Examples of collateral consequences of a multiple count conviction cited in the *Benton* opinion included impeachment at a later trial and enhanced sentencing statutes utilized in many states. *Benton*, at 790, 791. The *Benton* examples, though significant in themselves, are purely theoretical and pale in comparison to the direct collateral effects facing this petitioner. Lee S. Leichtling, D.D.S., is a professional man, currently fighting to retain his license in state administrative courts. The effect of a multiple count conviction in these proceedings cannot be overstated.

CONCLUSION

For the above-stated reasons and because of the important and far reaching constitutional question involved the petition for a writ of certiorari should be granted.

Respectfully submitted,

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